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75-477

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1975

JACK B. COMBS, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

Petition for a Writ of Certiorari to the Court of Appeals, Sixth Circuit

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SUBJECT INDEX

	Page
Introduction	4
Opinion Below	4
Jurisdiction	4
Questions Presented	5
Did the unnecessary delay of four years from the date of the offense to indictment violate appellant's right to due process?	5
Did the government deny appellant a fair trial by failing to prove by sufficient evidence the required intent?	5
Did the sentencing procedure deny appellant fundamental fairness?	6
Statement of Case	6
Reasons for Allowance of Writ	9
Conclusion	15
Appendix A	16

TABLE OF CASES AND STATUTES CITED

Cases	Pages
Barker v. Wingo (1973) 407 U.S. 514	9
CIT Corporation v. United States CA Wash (1945) 150 Fed 2d 84, at 93	11
Townsend v. Burke (1948) 334 US 736	14
United States v. Infanti CA NY (1973) 474 Fed 2d 522	9
United States v. Manuella CA NY (1973) 478 Fed 2d 440	13
United States v. Marion (1971) 404 U.S. 307	10

Statutes	
Federal Rules of Appellate Procedure 48(b)	6, 9
18 United States Code, Section 1010	5, 7, 11
28 United States Code, Section 1254(1)	5

IN THE SUPREME COURT

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October Term, 1975

Number

JACK B. COMBS, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals, Sixth Circuit

INTRODUCTION

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals, Sixth Circuit, entered on July 23, 1975.

OPINION BELOW

The opinion of the Court of Appeals is printed in Appendix A hereto, and is unreported.

JURISDICTION

By indictment filed March 27, 1973, in the United States District Court, Eastern District of

Kentucky, appellant was charged with a violation of Title 18, Section 1010, United States Code. A guilty verdict was entered on May 14, 1973 and sentence was imposed of one year, one day, to be served, and a fine imposed of $2,000.00. A Notice of Appeal to the Court of Appeals, Sixth Circuit was filed on May 13, 1973. On July 23, 1975, judgment was entered by the Court of Appeal affirming the judgment of the District Court. Appellant filed a Petition for Rehearing in the Court of Appeal on August 6, 1975. Said Petition for Rehearing was denied on September 15, 1975. This Petition for Writ of Certiorari is made pursuant to 28 United States Code, Section 1254(1).

QUESTIONS PRESENTED

DID THE UNNECESSARY DELAY OF FOUR YEARS FROM THE DATE OF THE OFFENSE TO INDICTMENT VIOLATE APPELLANT'S RIGHT TO DUE PROCESS?

DID THE GOVERNMENT DENY APPELLANT A FAIR TRIAL BY FAILING TO PROVE BY SUFFICIENT EVIDENCE THE REQUIRED

INTENT?

DID THE SENTENCING PROCEDURE DENY APPELLANT FUNDAMENTAL FAIRNESS?

STATEMENT OF CASE

A pre-trial evidentiary hearing was held in the District Court to determine whether the delay of four years in the prosecution of the case violated the Constitution and thereby required dismissal. Appellant's motion was based on the grounds that appellant had the due process right not to be deprived of his ability to defend himself; that the Sixth Amendment right to be free of hardship and anxiety which results from lengthy and uncertain delays was violated; and that the trial court under its broad power granted by Federal Rule of Appellate Procedure 48(b) should dismiss.

The trial court based its denial of the motion to dismiss on the absence of a sufficient showing of actual prejudice. The trial court noted that the evidence at trial would be based on documents and that appellant had ample opportunity to re-

fresh his memory from such documents. The Court of Appeal, in affirming the District Court, noted that appellant failed to demonstrate that any important witnesess or documents were not available at trial.

During trial, appellant's counsel, through extensive cross-examination of prosecution witnesses and by ample defense testimony, clearly indicated to the judge and jury that the government failed to prove the criminal intent required by Section 1010 of Title 18, United States Code. On appeal to the Court of Appeals, appellant clearly showed that the government's case was based solely on evidence that a false statement had been made on the credit application. Citing case authority which required a showing of both knowledge that the statement was false and that the statement was made for the purpose of obtaining a loan, with the intent that the loan be insured by the Federal Housing Administration, appellant argued on appeal that he was denied a fair trial in that there was a total absence of the

required proof that he knew the statement was false and that he possessed the necessary intent.

The Court of Appeals concluded that appellant's failure to note on the loan application four outstanding loans supported the conclusion that he possessed the requisite intent to support his conviction.

The trial court proceeded immediately to sentence appellant following the verdict. No presentence report was obtained to guide the court in its discretion. On appeal, appellant argued that he was denied fundamental fairness at the sentencing hearing not only because the court acted without the aid of a presentence report, but because the court expressed a personal bias towards appellant, considered improper matters in determining sentence; offered appellant no opportunity to prepare for sentencing; and delegated its duty to provide a fair hearing to appellant's counsel, who waived the necessity for a presentence investigation and urged the court to proceed.

The Court of Appeals concl uded that the District Court's questioning of appellant and his counsel elicited the necessary information to support its determination of sentence.

REASONS FOR ALLOWANCE OF WRIT

Delay Violated Due Process:

Appellant contends that the Court of Appeals failed to fairly consider the totality of the circumstances and that appellant had adequately demonstrated that no witness at trial could remember the events and this loss of memory amounted to unavailability.

The Court of Appeals failed to apply the balancing test set forth in Barker v. Wingo (1973) 407 U.S. 514, which had been held applicable under Federal Rule of Appellate Procedure 48(b). United States v. Infanti CA NY (1973) 474 Fed. 2d 522. The court noted that appellant failed to show any actual prejudice. Appellant contends that this consideration failed to consider the other elements set forth in the balancing test; and further, that appellant had shown actual prejudice

to his trial when none of the witnesses, either prosecution or defense, could remember the details surrounding the execution of the documents. It was appellant's burden to explain and defend against what the documents purportedly showed. In order to do this, he had to rely on his memory and the memory of the other persons involved in the transaction. Because of the inordinate pre-indictment delay of four years, he was unable to rely on his own memory, and as the trial transcript shows, none of the persons involved could remember the transaction. As a direct result of the delay and the fading memories that result with the passage of time, appellant was without any defense.

United States v. Marion (1971) 404 U.S. 307 recognized that the due process clause provides a basis for dismissing an indictment if the defense can show at trial that the prosecutorial delay has prejudiced the right to a fair trial. Appellant contends that the failure of the trial court to grant his pretrial motion to dismiss for

unreasonable pre-indictment delay violated his right to a fair trial. He was actually prejudiced in two aspects by the delay in indictment: he was denied due process in that he had no opportunity to prepare or present any defense and he was denied his ri ght to effective cross-examination of government witnesses (i.e., none of the witnesses could recall the events surrounding the execution of the documents.)

Intent Was Not Proven:

Section 1010 of Title 18, United States Code, is clear in its requirement of proof of a criminal intent. The Court of Appeals erred in its decision that appellant's failure to note on the application four outstanding loans supports the conclusion that he possessed the required intent. "It is not sufficient to prove guilt to show that defendant signed a document with an untruthful statement... the burden is on the government to prove his knowledge of its falsity and his criminal intent." CIT Corporation v. United States of America

CA Wash (1945), 150 Fed. 2d 84, at 93.

There was no direct evidence proving intent, and no circumstantial evidence which would support a reasonable inference that appellant criminally intended to make a false statement in order to obtain the loan.

Sentencing Procedure Denied Fairness:

The Court of Appeals, in its ruling regarding the sentencing, only discussed the lack of a presentence report. Appellant's brief presented several errors allegedly made by the trial court: the trial court expressed a personal bias toward appellant; considered improper matters in determining sentence; failed to allow adequate opportunity to prepare for sentencing; and permitted counsel for appellant to proceed to sentencing in the absence of any guides before the court.

The Court of Appeals stated that the absence of the presentence report was due to appellant's lack of cooperation. The transcript clearly revealed that it was appellant's counsel's decision not to prepare the presentence report prior to

verdict. Appellant should not be penalized in any manner by the trial strategy of counsel.

The case of United States v. Manuella (1973) CA NY 478 Fed 2d 440, discussed the importance and effectiveness of a presentence report and states that dispensing with such report should be done rarely and then only for good cause. Appellant notes that the sentencing followed immediately the verdict solely because appellant's counsel desired to return to California. The trial court attempted to substitute for the assistance of a presentence report its own questioning of counsel and appellant. This was not sufficient to enable the court to properly exercise its discretion. As noted in Manuella, although the court may elicit mitigating factors at the hearing, if such factors were presented via a presentence report and by a defendant fully prepared and free of the strain of trial, these factors would have been given more consideration.

Appellant was denied effective assistance of counsel at his hearing in that his counsel lacked knowledge of the procedure; failed to provide an

alternative method by which the probation department could provide a presentence report; and permitted sentencing to proceed in the absence of a presentence report, although the trial court had indicated several times the need for such a report.

A review of the sentencing transcript reveals that the trial court spent a great deal of time discussing appellant's sexual behavior. "The appellate court may scrutinize the sentencing process to insure that the trial judge based his decision on reliable information." Townsend v. Burke (1948) 334 U.S. 736. The trial judge's remarks at the time of sentence, expressing his concern over appellant's sexual behavior, were so fraught with personal bias as to constitute a denial of due process.

The only facts before the court were that appellant was a veteran, had a family of three, had no prior criminal record, and was a Christian man who found himself in debt and made a mistake. There is nothing in the record which would

support a finding that appellant would successfully complete a probatio nary term; nothing to indicate that rehabilitation could more easily be attained by probation; and nothing to indicate his present status as to employment and future plans.

Appellant contends that his application for probation was not fairly considered by the Court in the absence of a presentence investigation and othe r reliable information.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Nicholas G. Demma
Counsel for Petitioner

APPENDIX "A"

FILED

July 25, 1975

John P. Hehman,
Clerk

Number 74-1215

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF
AMERICA,

Plaintiff-Appellee,

ORDER

v.

JACK B. COMBS,

Defendant-Appellant

/

Before: EDWARDS and CELEBREZZE, Circuit Judges, and CECIL, Senior Circuit Judge.

On May 14, 1973, Appellant was convicted in District Court of falsifying an application for an FHA guaranteed loan in violation of 18 U.S.C. §1010. Appellant brings this appeal urging that he was denied due process by the passage of four years between commission of the crime and his

indictment; that there was insufficient evidence at trial upon which his conviction could be based; that the District Court abused its discretion by admitting copies of the loan application and related documents; and that the sentencing procedure violated his due process rights.

Appellant's crime was not such as would put the government on notice immediately. Once the government discovered that the loan application contained falsehoods, it took speedy action in prosecuting Appellant. In any event, Appellant has completely failed to demonstrate that any important witnesses or documents were not available at the time of trial.

In viewing the evidence at Appellant's trial most favorably from the standpoint of the government, United States v. Kubeck, 487 F. 2d 1256, 1258-1259 (6th Cir. 1973), Appellant's failure to note on the loan application four outstanding loans supports a conclusion that he possessed the requisite intent to support his conviction.

Admission of copies of the loan application

and related documents, which the bank kept in the regular course of its business, the authenticity of which were verified by bank officials, did not violate the hearsay rule.

Finally, the District Court questioned Appellant and his counsel and elicited information which would have been contained in a presentence report. Such report was not available because Appellant refused to cooperate. His lack of cooperation was offset by the District Court's effective questioning.

Upon due consideration of the record, briefs and argument of counsel,

IT IS ORDERED that the judgment of the District Court be, and it is, hereby affirmed.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

By /s/ Grace Keller
Chief Deputy

FILED
September 15, 1975
John P. Hehman,
Clerk

Number 74-1215

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ORDER

JACK B. COMBS,

Defendant-Appellant.
_____/

Before: EDWARDS, CELEBREZZE, Circuit Judges, and CECIL, Senior Circuit Judge.

Appellant having filed a petition for rehearing with this Court, and this Court having considered said petition and being duly advised in the premises,

It is ORDERED that the petition for rehearing be, and it is, hereby denied.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-477

JACK B. COMBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was denied due process of law by the passage of approximately four years between his commission of the offense and his indictment; that there was insufficient evidence to show that he had a criminal intent in filing a false statement for the purpose of obtaining a Federal Housing Administration (FHA) insured loan; that the sentencing procedure employed by the district court denied him due process of law; and that his counsel at the sentencing procedure was incompetent.

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of falsifying an application for an FHA guaranteed loan in violation of 18 U.S.C. 1010. He was sentenced to imprisonment for one year and one day and was fined $2,000. The court of appeals affirmed (Pet. App. 16-18).

The evidence showed that on the basis of a credit application prepared by petitioner (Tr. 158, 217-219, 581),[1] the First Security National Bank and Trust Company (First Security Bank) loaned him $2,500 (Tr. 235-236). The credit application, which indicated on its face that its purpose was "to obtain credit under the provisions of Title I of the National Housing Act" (Exhs. 1 and FHA 1),[2] contained numerous false statements:[3] that petitioner had no past due obligations owed to or insured by any agency of the federal government (Tr. 193); that he had no existing obligations to other banks (Tr. 316-319, Exh. 3; Tr. 322-326, Exh. 4; Tr. 330-331); that First Security Bank held a lien on his 1967 Cadillac automobile (Tr. 157); and that the loan would be used to improve petitioner's home by adding a family room to the basement and fixing a leak in a retaining wall (Tr. 225, 360-363, 371-372, 381). On the basis of this credit application, First Security Bank submitted the loan to the FHA to be insured (Tr. 149).

1. Petitioner contends (Pet. 9-11) that he was denied due process of law by the passage of four years between the commission of the crime and the return of the indictment. Petitioner does not contend that the delay was caused by any attempt by the government to obtain

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[1]"Tr." refers to the transcript of the trial.

[2]"Exh." refers to exhibits forming part of the record below.

[3]The transcript references are to testimony establishing the falsity of the statements.

an advantage.[4] Rather, he claims only that he was prejudiced since "he had no opportunity to prepare or present any defense and he was denied his right to effective cross-examination of government witnesses" because none of the witnesses could recall the events surrounding the execution of the document (Pet. 11).

This claim was insufficient to establish prejudice. Here, the trial court after a pre-trial hearing correctly found that the evidence at trial would be based primarily on documents and that petitioner had ample opportunity to refresh his memory from these documents (H. 99-100). The court of appeals, in affirming, noted that petitioner "completely failed to demonstrate that any important witnesses or documents were not available at the time of trial" (Pet. App. 17). The courts below thus properly declined to dismiss the indictment. See *United States* v. *Marion*, 404 U.S. 307, 325-326.

2. Petitioner contends (Pet. 11-12) that there was insufficient evidence to establish the requisite intent. He does not deny that the application contained false statements. The evidence at trial showed that the statement that petitioner had no past due obligations owed to or

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[4]Evidence at the pre-trial hearing established that the credit application was filed with the First Security Bank on or about February 13, 1969 (H. 70). On January 15, 1970, the original credit application was forwarded to the FHA with a claim for the insurance because of default on the loan (H. 73-74). The matters involved in this case were brought to the attention of the FBI by the Fayette County Sheriff's Office on May 15, 1972 (H. 86, 90). On September 11, 1972, agents conducting the investigation obtained a statement from petitioner about the facts surrounding the subject loan (H. 17, 21-22). On or about December 5, 1972, the FBI agent in charge of the investigation brought the matter to the attention of the United States Attorney's Office (H. 87). Petitioner was arrested on December 12, 1972 (H. 88). The indictment was returned by the next regularly sitting grand jury for the Eastern District of Kentucky at Lexington on March 27, 1973 (H. 88).

insured by any agency of the federal government was false (Tr. 193, Exhs. 1 and FHA 1), and the application form itself made clear that in order to be eligible for any further FHA Title I loans any defaults in existing debts must be eliminated. Petitioner's statement was thus designed to establish eligibility for the loan he was seeking. Petitioner also did not list on the application other outstanding loans (Exh. 3, Tr. 316-319; Exh. 4, 322-326, Tr. 330-331).

Viewed most favorably to the government, *Glasser* v. *United States*, 315 U.S. 60, 80, the evidence was sufficient, as the court of appeals found, to show that petitioner knowingly made false statements with the intent to obtain a loan and influence the FHA (Pet. App. 17). See *United States* v. *Barbato*, 471 F.2d 918, 922 (C.A. 1); *United States* v. *Leach*, 427 F.2d 1107, 1112 (C.A. 1), certiorari denied, 400 U.S. 829; *Steingold* v. *United States*, 262 F.2d 1, 2 (C.A. 6).

3. Petitioner argues (Pet. 12-15) that the court's sentencing procedure denied him due process of law because he did not receive adequate assistance of counsel in regard to sentencing, as a result of which there was no pre-sentence report; petitioner also claims that the judge was biased against him.

a. The Probation Department informed the court at sentencing that it could not submit a pre-sentence report because petitioner's counsel had advised it that for strategic reasons, petitioner would not fill out the probation forms (S.S. 3-4).[5] The court indicated its willingness to delay sentencing to obtain a report (S.S. 6), but petitioner's counsel requested that the court proceed directly to sentencing, indicating that petitioner and two of his co-counsel

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[5]"S.S." refers to the transcript of the sentencing session on May 14, 1973.

would respond to any inquiries the court might make (S.S. 7).

Rule 32(c)(1), Fed. R. Crim. P., provides that a defendant, with the court's permission, may waive a pre-sentence investigation and report. The court rigorously questioned the U.S. Attorney, petitioner and petitioner's counsel about information relevant to sentencing, gave petitioner an opportunity to rebut and explain the information presented and to describe the circumstances surrounding the criminal offense (S.S. 15-31). In light of petitioner's express waiver and in the absence of any showing of prejudice to petitioner from being sentenced without a pre-sentence report,[6] the court did not abuse its discretion. *United States* v. *Sanders*, 466 F.2d 673, 674 (C.A. 9); *United States* v. *Teague*, 445 F.2d 114, 122 (C.A. 7). See also *United States* v. *Frazier*, 479 F.2d 983, 987 (C.A. 2).

Petitioner contends that his lawyers were ineffective at sentencing because they lacked knowledge of the sentencing procedure and because they told him to proceed to sentencing so that counsel could meet a scheduled flight to California that day (Pet. 13-14). Petitioner presents no evidence to support these allegations and the record of the sentencing session shows none. Moreover the record of the sentencing session shows that petitioner's counsel made a reasonable tactical decision in trying to avoid an investigation into petitioner's past.

b. Petitioner alleges that the court's remarks at the pre-sentencing hearing concerning his "sexual behavior were so fraught with personal bias as to constitute a denial of due process" (Pet. 14). At a recess during the trial, in the presence of a witness and at least two jurors, petitioner had displayed photographs of women naked

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[6]Indeed, the information developed at the pre-sentence hearing showed that petitioner had good reason to void an extensive investigation into his past activities. See, *e.g.*, S.S. 15.

from the waist up (Tr. 478-516). The interrogation at the sentencing hearing was related to this incident (S.S. 24-30)[7] and was appropriate in a sentencing proceeding. See *Williams* v. *New York*, 337 U.S. 241, 246. This inquiry did not indicate prejudice against petitioner.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

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[7]The Assistant U.S.Attorney stated that some of the photographs were of a prosecution witness, and that he was advised that petitioner had sent copies of them to the witness' baby sitter with a letter indicating that he would get the witness by use of the pictures if she testified (S.S. 22). Petitioner denied this but admitted that one of the women in the pictures was a married woman with whom petitioner had had sexual relations. After she was divorced and her ex-husband wrote a threatening letter to petitioner blaming him, petitioner sent the man a photograph of his wife showing her nude from the waist up and writing that he should forget it because his wife "is not the most innocent person in the world" (S.S. 29).